

**IN THE HIGH COURT OF KERALA AT ERNAKULAM**

**PRESENT :**

**THE HONOURABLE MR. JUSTICE R.BASANT**

**MONDAY, THE 11TH DECEMBER 2006 / 20TH AGRAHAYANA 1928**

**CrL.MC.No. 4191 of 2005()**

**CC.172/2005 of JUDL. MAGISTRATE OF FIRST CLASS COURT, THALASSERY**

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**PETITIONER: ACCUSED**

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- 1. EDAKKANDY PARAMBATH NASEEMA,  
AGED 40 YEARS, D/O.SUHARA, RESIDING AT "MANHAL",  
VAYALALAM, P.O.TEMPLE GATE, THALASSERY.**
- 2. A.P.AHAMMEDKUTTY, S/O.UMMER,  
EDAKKANDY PARAMBATH VEEDU, VAYALAM, THALASSERY.**

**BY ADV. SRI.T.M.ABDUL LATHEEF  
SMT.P.VIJAYALAKSHMI.**

**RESPONDENTS: COMPLAINANT & STATE**

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- 1. STAT OF KERALA, REPRESENTED BY THE  
PUBLIC PROSECUTOR, HIGH COURT OF KERALA,  
ERNAKULAM.**
- 2. S.H.O.THALASSERY.**
- 3. KOODALI SUDHAKARAN, S/O.RAMAN,  
THIRUVANGAD AMSOM, P.O.TEMPLE GATE,  
THALASSERY.**

**BY PUBLIC PROSECUTOR SRI. AKBAR K.A  
SRI.P.SANJAY  
SRI.A.PARVATHI MENON**

**THIS CRIMINAL MISC. CASE HAVING BEEN FINALLY HEARD ON 11/12/2006,  
THE COURT ON THE SAME DAY PASSED THE FOLLOWING:**

**R.BASANT.J**

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**CrI.M.C No. 4191 OF 2005**

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**Dated this the 11<sup>th</sup> day of December 2006**

**ORDER**

The petitioners-spouses, are accused in a prosecution initiated against them under section 420 read with 34 I.P.C. They are wife and husband respectively.

2. Proceedings against them were initiated on the basis of a private complaint . The complainant is represented by his Power of Attorney holder- his own brother. The power of Attorney holder has shown himself as the complainant. The complaint is actually preferred on behalf of his brother Dinesan.

3. The crux of the allegations in the complaint is that an agreement dated 3-5-2004 was entered into with the brother of the Power of Attorney holder for sale of property.. An amount of Rs.7 lakhs was advanced and the total sale consideration was allegedly fixed at 15 lakhs. On 19-5-2004, the petitioners/ accused allegedly entered into another agreement dated 19-5-2004 promising to sell the property to one Velu Narayanan and Noushad. They had allegedly received an advance of sale

consideration of Rs. 10 lakhs out of the total consideration of Rs. 11 lakhs. It was alleged that the conduct of the accused persons entering into an agreement dated 19-5-2004 after entering into an agreement earlier on 3-5-2004 amounts to the offence of cheating.

4. Investigation was conducted by the Police. Final report has already been filed. Cognizance has been taken by the learned Magistrate. The petitioner have rushed to this Court without and before claiming discharge from the learned Magistrate under Section 239/240 of the Cr.P.C

5. Relying on the illustration 'g' of Section 415 the learned counsel for the petitioner contends that the alleged conduct amounts only to a breach of contract and can give rise only to civil action for breach of contract. It cannot at any rate justify the launching of a criminal prosecution. This in short is the contention

6. I shall scrupulously avoid any expression of opinion on merits. But I am certainly persuaded to agree that the contention of the learned counsel for the respondents that there is absolutely no justification to invoke the powers under Section 482 of the Cr.P.C in the facts and

circumstances of this case

7. The crucial question is whether without any intention to deliver the property, the defacto complainant was dishonestly induced to advance money. I am certainly of opinion that the said question must be considered by the learned Magistrate while exercising his jurisdiction under Section 239/240 of the Cr.P.C. if claim for discharge is made or otherwise later at the stage of deciding on conviction/ acquittal of the accused. Ordinarily and normally premature termination of the proceedings must be claimed under Section 239/240 of the Cr.P.C and in every case where an order of discharge or acquittal can later be passed by the trial court this Court cannot be persuaded to invoke its jurisdiction under Section 482 of the Cr.P.C. Exceptional reasons must be shown to exist. I am unable to see any such reasons in the instant case. This I am satisfied is an eminently fit case where the petitioners must raise the plea for discharge before the learned Magistrate. Needless to say that when such plea is raised, the learned Magistrate must consider the same on merits and pass appropriate orders expeditiously.

8. The learned counsel for the petitioners submits that the

petitioners will be put to unnecessary hardship and difficulties if their personal appearance were insisted on all days of posting. Of course the petitioners can apply for exemption from personal appearance and in the facts and circumstances of this case I find no reason for the learned Magistrate to make insistence on their personal appearance unless and before the court comes to the conclusion that the charges are liable to be framed against them under section 240 of the Cr.P.C

9. With the above observations this Crl.M.C. is dismissed.

R.BASANT, JUDGE

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